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Supreme Court, U.S.
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No. 02-1862

IN THE

Supreme Court of the United States

SHAREEF COUSIN,
Petitioner,

v.

BYRON BERRY AND ROGER JORDAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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MISCELLANEOUS

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REPLY BRIEF

Respondents' Brief in Opposition cannot refute the principal point in the Petition: As exemplified by the Fifth Circuit's decision in this case, the courts of appeals have engaged in massive and systematic resistance to this Court's case law on prosecutorial absolute immunity. Indeed, when an isolated court attempts to apply that case law faithfully – as did the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) – the decision is dismissed unapologetically as out of step with the law in the lower courts. *See* Pet. App. at 10a n.6. The result is a series of decisions such as the one reached by the Fifth Circuit below, holding that prosecutors merit absolute immunity for a range of conduct – including coercion and fabrication of false evidence, detention of defense witnesses to prevent them from testifying, and wholesale suppression of obviously exculpatory evidence – even when there is no common-law tradition of immunity for that conduct, and even when the conduct at issue is plainly outside any legitimate understanding of the advocacy function. In the courts of appeals, then, cases such as *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), *Burns v. Reed*, 500 U.S. 478 (1991), and *Kalina v. Fletcher*, 522 U.S. 118 (1997), are essentially a dead letter, confined to their particular facts. Even egregious prosecutorial misconduct such as that alleged here goes unpunished. Review by this Court is thus urgently needed.

1. The Opposition maintains that the analysis routinely applied by the Fifth Circuit and the vast majority of other Circuits is entirely consistent with *Buckley*, *Kalina*, and the rest of this Court's recent immunity decisions. But, as used by respondents and the courts of appeals, those cases are virtually unrecognizable.

This Court has emphasized, for example, that lower courts should be "quite sparing" in the recognition of absolute immunity, *Buckley*, 509 U.S. at 269 (internal quotation marks omitted), reflecting the presumption "that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns*, 500 U.S. at 486-87. But the lower courts' application of immunity has been anything but sparing.

Indeed, as demonstrated in the Petition and unrebutted by the Opposition, the courts of appeals have blatantly disregarded this Court's admonition, with the Fifth Circuit a particularly egregious offender. *See, e.g.*, Pet. App. 6a-18a (absolute immunity for a range of prosecutorial misconduct); *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995) (absolute immunity for allegations that prosecutor intimidated witnesses in an effort to suppress their testimony); *Mowbray v. Cameron County*, 274 F.3d 269, 276-77 (5th Cir. 2001) (absolute immunity for allegations that prosecutor "shop[ed] for experts" to support baseless theory), *cert. denied*, 535 U.S. 1055 (2002); *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995) (prosecutor is absolutely immune for allegations of "deliberate fabrication of false evidence" to the extent the fabrication involves out-of-court efforts to control a witness that "are made subsequent to the decision to indict"); *Carter v. Burch*, 34 F.3d 257, 261-63 (4th Cir. 1994) (absolute prosecutorial immunity is appropriate for allegation that prosecutor "coached [the witness] not to testify" in a way that would have helped the defendant). Indeed, it is revealing that, although the Court's recent cases have all denied absolute immunity to prosecutors at least in part, *see, e.g.*, *Burns*, 500 U.S. at 492-96; *Buckley*, 509 U.S. at 271-78; *Kalina*, 522 U.S. at 129-31, cases in the courts of appeals denying absolute immunity for prosecutorial misconduct are virtually

non-existent. *See generally* Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity – How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C.L. Rev. 1019, 1019-20 (1996) ("When the United States Supreme Court handed down its opinion in *Buckley v. Fitzsimmons* in June 1993, the decision was heralded as the beginning of the end of absolute prosecutorial immunity. . . . Whatever threat *Buckley* may have posed to the highly deferential doctrine of prosecutorial immunity, however, has not yet materialized.") (footnote omitted).

2. The Opposition seeks to obscure the wholesale abandonment of this Court's immunity jurisprudence by suggesting that prosecutors are "functioning as an advocate for the State" when they fabricate testimony and when the detain defense witnesses to prevent them from testifying. Opp. at 5, 8. But the arguments in the Opposition serve principally to illustrate how far the courts of appeals in general and the Fifth Circuit in particular have strayed.

With respect to the fabrication of testimony, for example, the Fifth Circuit and the Opposition frankly acknowledge that the decision below creates a direct conflict with the D.C. Circuit's decision in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). *See* Opp. at 2 ("[T]he D.C. Circuit has a narrower conception of the advocatory role, as recognized by the Fifth Circuit."). But what is most striking is that neither respondents nor the court of appeals even attempt to justify the rejection of the D.C. Circuit's opinion in *Moore* with reference to the analysis that this Court has deemed appropriate. The court of appeals never sought to show, for example, that there was any absolute immunity at common law for such conduct, despite this Court's repeated assertion that a common-law tradition of immunity is a necessary pre-condition for immunity to attach. *See Buckley*, 509 U.S at

268-69 (noting burden on official to "identify a common-law tradition of absolute immunity"); *id.* at 281 (Scalia, J., concurring) (noting, when analyzing claims of absolute immunity for conduct that occurs after there is probable cause, that "reference to the common-law cases will be indispensable" to show when prosecutors can properly claim to be acting "'as advocates'"). *Cf.* Pet. at 23-24 (demonstrating the absence of such common-law tradition).

Nor did the court of appeals seek to justify the extension of immunity to a function such as fabrication of testimony that could just as easily have been performed by a police officer, despite this Court's repeated statements that actions that would otherwise be investigative do not become advocatory merely because they are performed by a prosecutor, even after there is probable cause. *See, e.g.*, *Buckley*, 509 U.S. at 276; *Kalina*, 522 U.S. at 129-30; *see also Moore*, 65 F.3d at 214 (concluding that fabricating testimony involves the misuse of investigative techniques, because it relates to "a typical police function, the collection of evidence to be used in a prosecution").

The treatment of the allegations regarding detention of defense witnesses reflects the same casual disregard for this Court's precedents. Once again, neither the court of appeals nor the Opposition even tried to show that there was a common-law tradition of immunity for the detention of defense witnesses. *Cf.* Pet. at 27 (demonstrating the absence of such a common law tradition).

Nor was there any effort to square the grant of immunity for such conduct with the purposes of § 1983. *See Buckley*, 509 U.S. at 269 (noting relevance of an inquiry into the purposes of § 1983). As noted in the petition, *see* Pet. at 27, such an inquiry would have made clear the inappropriateness of granting absolute immunity – which was intended to give

a prosecutor confidence to present evidence to the triers of fact – for intentional misconduct that prevents critical exculpatory evidence from reaching the judge and jury.

Finally, there was no effort to explain why the detention of defense witnesses to prevent them from testifying requires any special legal training or skill. *See, e.g.*, *Buckley*, 509 U.S. at 276; *Kalina*, 522 U.S. at 129-30. Nor would such an effort have succeeded, because (as respondents' use of the term "marshaling" nicely illustrates) detaining witnesses in the manner alleged could be performed by anyone in the courthouse, including a police officer, marshal, or member of the public.[1]

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[1] Respondents urge that the Petition be denied because the "failure to secure the testimony of certain of the alibi witnesses was the fault of Petitioner's defense counsel and not that of Respondents." Opp. at 9 n.1. This effort to create a factual dispute is entirely inappropriate at this stage in the proceedings because, as the Fifth Circuit recognized, petitioner's allegations must be taken as true. *See, e.g.*, *Buckley*, 509 U.S. at 261 (assuming that petitioner's allegations are true and that they set forth constitutional violations for which § 1983 provides a remedy).

In any event, Respondents' argument is baseless. Respondents *conceded* that they told the witnesses to wait in the prosecutors' offices, rather than at the courthouse. Complaint ¶ 171 (Pet. App. 90a); Plaintiff's Reply Br., Ex. F, at 57 (providing district court with testimony from respondents admitting that they took at least three and perhaps four defense witnesses to the District Attorney's offices). Moreover, Cousin's criminal defense attorney – who was trying his first capital murder trial – testified unambiguously that he had told Berry he was trying to locate the witnesses, and that Berry had disclaimed any knowledge of the witnesses' whereabouts. *See* New Trial Tr. at 129 ("I recall [Berry] saying, 'Do you plan on using Michael Doss or any alibi witnesses' whatever it was. I said 'Yes, we do.' Referring to Michael Doss, I said, 'He's not out there right now. We're trying to get him.' [Berry] said, 'Well, let me know. We want him too.' But at no point were we ever informed that he was at the D.A.'s office, because I would have immediately request[ed] that he be brought over.").

Unfortunately, the opinion below is not unique in this regard. Time and again, the Fifth Circuit and the other courts of appeals have replaced the analysis this Court has required with a largely temporal analysis that immunizes virtually all prosecutorial conduct after probable cause as long as it is done "for the purpose of securing a conviction." Opp. at 8; *see, e.g.*, Pet. App. at 16a-17a;[2] *Mowbray*, 274 F.3d at 276-77(no analysis of history, purpose, or need for special legal skill or training); *Brandley*, 64 F.3d at 201 (same); *Hill*, 45 F.3d at 662 (relying principally on temporal analysis); *Carter*, 34 F.3d at 261-63 (same).

The time has come for this Court to reaffirm that this Court meant what it said in *Buckley*, *Burns*, and *Kalina*.

3. Finally, with respect to the wholesale suppression of obviously exculpatory evidence, respondents never address the principal point made in the Petition, namely, that *Imbler v. Pachtman*, 424 U.S. 409 (1976), should be reconsidered. As commentators and Justices of this Court have recognized, *Imbler*'s failure to adequately address the common-law roots

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[2] The Fifth Circuit below sought to justify immunity for detention of witnesses on the ground that the conduct happened "during trial." Pet. App. 16a. But the analysis this Court set forth in *Buckley* and *Kalina* expressly rejects such a temporal analysis. *See* Pet. at 22-23. Moreover, to characterize the detention of defense witnesses as having occurred "during trial" is misleading: the conduct alleged did not occur in courtroom, but merely occurred on the days that the trial was taking place. To grant immunity for anything a prosecutor does for the purpose of securing a conviction while a trial happens to be going on – even if the prosecutors actions require no special training or skill, even if there is no historical tradition of immunity for such actions, and even if the actions are intended to prevent evidence from ever reaching the jury – is to flatly reject *Buckley* and *Kalina*. Finally, respondents protest weakly that the Fifth Circuit used the "timing of the event" as a relevant, though not dispositive, factor. Opp. at 10. But the sole factor supporting the decision below was that the conduct occurred "during trial."

of the claimed immunity and its expansive view of absolute immunity is out of touch with this Court's more recent cases. *See, e.g.*, Douglas J. McNamara, Buckley, Imbler *and* Stare Decisis: *The Present Predicament of Prosecutorial Immunity and ar End to Its Absolute Means*, 59 Alb. L. Rev. 1135, 1195 (1996) ("*Imbler* was a misstep along the way of the historical-functional approach, and remains out-of-step with [the Court's] current practice."); *Burns*, 500 U.S. at 505 (Scalia, J., joined by Blackmun and Marshall, JJ., concurring) (refusing to employ the "methodology" in *Imbler* and noting that *Imbler* relied on "a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities"); *Kalina*, 522 U.S. at 134-35 (Scalia, J., joined by Thomas, J., concurring) (criticizing *Imbler* as "mak[ing] faithful adherence to the common law embodied in §1983 very difficult").

Respondents do not even try to square *Imbler* with the Court's more recent decisions, opting instead to reiterate the uncontested point that *Imbler*'s treatment of absolute immunity for suppression of evidence – in a footnote and in dicta – is consistent with the decision of the court of appeals in this case. But *Imbler*'s decision in this regard is flatly inconsistent with *Buckley* and *Kalina*. As demonstrated in the Petition, the grant of absolute immunity for the unconstitutional suppression of exculpatory evidence has no historical antecedent. *See* Pet. at 28-29. Moreover, such immunity is flatly contrary to the purposes of the absolute immunity doctrine because it provides immunity for actions that deprive the tribunal of relevant evidence. *See id.* at 29. *Imbler*'s grant of absolute immunity for the suppression of exculpatory evidence should be reconsidered.

* * *

The decision below reflects the view of the Fifth Circuit and the other courts of appeals that prosecutors are absolutely immune for virtually all conduct that occurs after there is probable cause. Although it is easy to hypothesize a "parade of horribles" resulting from this unbounded and misguided view of prosecutorial absolute immunity, the Complaint in this case eliminates the need for hypothesis. A sixteen-year-old boy was wrongly convicted of capital murder and spent more than a year on death row for a crime he did not commit. Nothing in this Court's cases justifies granting absolute immunity to the prosecutorial misconduct that is alleged to have brought about that result.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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